

IN THE UNITED STATES DISTRICT COURT
OR THE EASTERN DISTRICT OF CALIFORNIA

NICHOLAS VOVOS.

No. 2:21-CV-0837-KJM-DMC-P

Plaintiff,

ORDER

D. MARTINEZ, et al.,

Defendants.

Plaintiff, a prisoner proceeding pro se, brings this civil rights action under 42 U.S.C. § 1983. The matter was referred to a United States Magistrate Judge as provided by the Eastern District of California local rules.

On September 27, 2022, the Magistrate Judge filed findings and recommendations, which were served on the parties and which contained notice that the parties may file objections within the time specified therein. No objections to the findings and recommendations have been filed.

The court presumes that any findings of fact are correct. *See Orand v. United States*, 602 F.2d 207, 208 (9th Cir. 1979). The magistrate judge's conclusions of law are reviewed de novo. *See Robbins v. Carey*, 481 F.3d 1143, 1147 (9th Cir. 2007) ("[D]eterminations of law by the magistrate judge are reviewed de novo by both the district court and [the appellate] court . . ."). Having reviewed the file, the court declines to adopt the findings and recommendations.

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1 Citing Local Rule 230, the magistrate judge recommends granting defendant's motion to
2 dismiss and dismissing plaintiff's claim for excessive force because plaintiff did not file an
3 opposition. Under this District's Local Rules, for motions in pro se prisoner actions, failure to
4 oppose "may be deemed a waiver of any opposition to the granting of the motion and may result
5 in the imposition of sanctions." E.D. Cal. L.R. 230(l). It does not provide that a lack of
6 opposition can be construed as "a consent to the relief requested" by the moving party. F.&R. at
7 3, ECF No. 28; *cf. Ghazali v. Moran*, 46 F.3d 52, 54 (9th Cir. 1995) (dismissing case with
8 prejudice due to plaintiff's non-opposition because the local rules in question stated failure to
9 oppose a motion "shall constitute a consent to the granting of the motion").

10 Although plaintiff did not file an opposition, the court still has a duty to consider the
11 underlying merits. *See Elec. Recyclers Int'l, Inc. v. Calbag Metals Co.*, No. 14-01352,
12 2015 WL 1529490, at *2 (E.D. Cal. Apr. 2, 2015); *see also Knapp v. Cate*, No. 08-01779,
13 2013 WL 5466641, at *3 (E.D. Cal. Sept. 30, 2013) (finding the lack of opposition "did not
14 relieve the Magistrate Judge from the obligation to consider the underlying merits"). The court
15 **refers** the matter back to the assigned magistrate judge to consider the merits underlying the
16 motion to dismiss at ECF No. 26 and for all further pretrial proceedings consistent with this order.

17 IT IS SO ORDERED.

18 DATED: March 29, 2023.

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21 CHIEF UNITED STATES DISTRICT JUDGE
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